No. 537

In the Supreme Court of the United States

OCTOBER TERM, 1906

CHARLES H. RUTHERFORD, PETITIONER

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeals (R. 52-61; Pet. App. B), after modification, is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on January 28, 1959 (R. 62). A petition for rehearing was denied on March 17, 1959 (R. 63). The petition for a writ of certiorari was filed on April 13, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a search warrant, based primarily upon personal knowledge of the affiants but also upon some hearsay, justified the seizure from petitioner, and use in evidence, of betting paraphernalia.

2. Whether the evidence was sufficient to support petitioner's conviction for failure to register and pay the required federal tax with respect to horse racing wagers.

3. Whether the prosecution established proper venue.

STATUTES AND RULE INVOLVED

26 U.S.C. (1952 Ed., Supp. V) 7203, 68A Stat. 851, provides:

> *Willful failure to file return, supply information, or pay tax:*
>
> Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

26 U.S.C. (1952 Ed., Supp. V) 4401, 68A Stat. 525, provides:

* * * *

(c) *Persons liable for tax.*

Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery.

26 U.S.C. (1952 Ed., Supp. V) 4411, 68A Stat. 527, provides:

Imposition of tax.

There shall be imposed a special tax of $50 per year to be paid by each person who is liable for tax under section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable.

26 U.S.C. (1952 Ed., Supp. V) 4412, 68A Stat. 527, provides:

Registration.

(a) *Requirement.*

Each person required to pay a special tax under this subchapter shall register with the official in charge of the internal revenue district—

(1) his name and place of residence;

(2) if he is liable for tax under subchapter A, each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; and

(3) if he is engaged in receiving wagers for or on behalf of any person liable for tax under

subchapter A, the name and place of residence of each such person.

* * * * *

Rule 41, Federal Rules of Criminal Procedure, provides:

* * * * *

(c) *Issuance and Contents.* A warrant shall issue only on affidavit sworn to before the judge or commissioner and establishing the grounds for issuing the warrant. If the judge or commissioner is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall state the grounds or probable cause for its issuance and the names of the persons whose affidavits have been taken in support thereof. It shall command the officer to search forthwith the person or place named for the property specified. The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time. It shall designate the district judge or the commissioner to whom it shall be returned.

* * * * *

STATEMENT

Petitioner was charged by information in the United States District Court for the Southern District of California with a violation of 26 U.S.C. 7203.

supra, p. 2, alleging wilful failure to register and pay the wagering occupational tax required by 26 U.S.C. 4411 and 4412, *supra*, pp. 3-4 (R. 3). In a non-jury trial he was found guilty and fined $2500 (R. 37-38). On appeal (R. 39), his conviction was affirmed (R. 62; Pet. App. B).

1. On August 15, 1957, federal agent Katayama made an affidavit for a search warrant before a United States Commissioner, stating that he had "* * * reason to believe that on the premises known as Apartment F, 110 North Burris Road, Compton, California, in the Southern District of California, there is now being concealed certain property, namely betting markers, 'owe sheets', 'scratch' sheets, money, telephones, pencils, record paper, and other equipment and book-making paraphernalia, which are being used in violating the Internal Revenue laws pertaining to wagering, Sections 4401, 4411 and 4412, Internal Revenue Code, 1954. * * *" As grounds for the search warrant, there were attached three additional affidavits, one each by deputy sheriffs Fowler and Bublitz and one by agent Katayama (R. 25-33).

Fowler's affidavit stated that on August 1, 1957, he heard his confidential informant dial a certain telephone number and place a wager on a horse race. Police surveillance at the address at which this telephone was listed showed that one Howard Lee Cupp[1] left there at 5:50 p.m., and drove to the northwest corner of Long Beach Boulevard and Myrrh Street,

[1] Cupp was found by the trial judge to be not guilty of failing to pay a wagering occupational tax (R. 13-41).

Compton, California. About five minutes later, petitioner arrived in a Cadillac, and Cupp passed to petitioner a parcel containing white slips of paper. Petitioner was trailed to the North Burris Road apartment into which he carried the parcel of papers (R. 26-27). On July 26 and 30, and on August 5, 1957, at about 6:00 p.m., Cupp was observed to pass similar parcels of paper to petitioner at the same location, petitioner driving a Ford on two occasions. Each time petitioner proceeded to the North Burris Road apartment after receiving the papers from Cupp. On August 12 and August 13, 1957, at about 6:00 p.m., Cupp was again observed giving parcels of paper to petitioner at the same location (R. 27-28).

According to Fowler's informant, petitioner had a reputation as a bookmaker and had taken over the business of his father, a notorious bookmaker in the area. Petitioner was believed to use the "back office" operation where the bookie is not known to the bettors, and the only contact with the bookie is by the telephone "spot" employee (R. 28). Fowler, as an experienced police officer, was of the opinion that the white slips of paper passed to petitioner by Cupp were "professional betting markers of the type generally used by bookmakers" (R. 28-29).

Katayama's affidavit stated that on August 13, 1957, at about 6:14 p.m., he saw Cupp hand some slips of white paper to petitioner in his Cadillac and about fifteen minutes later petitioner's Cadillac was seen near the North Burris Road apartment. A check of internal revenue files showed that neither

Cupp nor petitioner had purchased a wagering tax stamp or paid the wagering tax.

Deputy sheriff Bublitz, in his affidavit, stated that on January 22, 1957, he interviewed one Earl Maltby, who stated that he had been accepting wagers on race horses on behalf of a person known to him only as "C.H." (petitioner's first initials). Maltby delivered each day's "action" at a prearranged meeting place at about 2:00 p.m. to a "male person about 36 years old, about 6 feet tall, with black hair and of a slight build, and who drove a 1954 Cadillac automobile." On several occasions Maltby was met by a woman who drove a green Ford (R. 31-32). On January 23, 1957, a check at petitioner's residence disclosed the green Ford in his garage. This Ford, registered in the name of Monica Kissell,[2] who was known to the affiant as petitioner's girl friend, was observed on several occasions in the garage at 110 North Burris Road. Prior to the time Maltby had been interviewed, he had been seen with petitioner in his 1954 blue Cadillac (R. 32-33). Petitioner was known to be "5' 10½" tall, brown hair and blue eyes, 150 lbs., age 36 in 1956, with two arrests for bookmaking and three for 'gambling'" (R. 33).

The search warrant was issued on August 15, 1957, and executed on the same day by agent Katayama. Betting paraphernalia, including a number of betting markers, a radio, and a telephone, were

[2] The charges against Monica Kissell, a co-defendant with petitioner and Cupp, were dismissed, on motion of the United States Attorney (R. 11).

seized under the search warrant (R. 22-24). A motion to suppress this evidence, on the ground that it had been unlawfully seized (R. 18-19), was denied (R. 34).

2. The evidence adduced at the trial, set out in petitioner's "condensed narrative statement of testimony" (R. 43-45), may be stated as follows:

On several occasions between July 25 and August 15, 1957, federal agents and state deputy sheriffs saw petitioner driving into an auto park adjoining Mark's Restaurant in Compton, California, at about 6:00 p.m. At these times, petitioner would meet Howard Cupp, who handed him a rolled up package of papers (R. 43-44). On some occasions at this location, Monica Kissell received from Cupp a rolled up package of papers, and once an unidentified woman handed such a package to petitioner (R. 44).

On August 15, 1957, at about 6:00 p.m., a deputy sheriff at the same auto park saw Cupp pass a package to petitioner. Shortly thereafter, agent Katayama knocked on the door of Apartment F, 110 North Burris Road, and said: "Open up. We are federal officers and have a search warrant." After failing to obtain a response and being forced to break the door for entry, the agent saw petitioner seated on a couch stuffing some papers underneath the seat with a brown paper bag containing papers at his feet. There was a stipulation that deputy sheriff Seltzer "would testify that pieces of paper in the brown paper bag and under the cushion of the couch contained notations of purported bets on horse races and figures showing the totalization of wins and

losses on the said purported bets" (R. 44-45). The handwriting of the bets was identified as that of Cupp, and the handwriting of the totalization figures was identified as that of petitioner. All of these papers were seized by the federal agent (R. 45).

In a conversation which federal agents had with petitioner at the apartment on August 15, 1957, "they asked him what the papers were and [petitioner] replied that they were betting markers that he picked up from a clerk of Swede's at the Mark's Restaurant auto park. [Petitioner] was asked what he was doing with them, and he replied that he was just figuring the wins and losses and that Swede would come around about 10:00 o'clock each night and pick them up. [Petitioner] stated he was getting $150.00 a week for his services. When asked if he knew he was required to have a wagering stamp, he said he did not need a stamp because he was not a bookmaker" (R. 45).

Petitioner did not register or pay a wagering occupational tax required of one engaged in the business of accepting and receiving wagers with respect to horse races (R. 43).

ARGUMENT

1. The contention (Pet. 9-14) that the affidavits on which the search warrant was based were not sufficient to show probable cause is without merit. These affidavits were not grounded solely on hearsay and conclusions; they contained specific statements of fact as to what the federal agent and the deputy sheriffs had personally observed. *Supra*, pp. 5-7. The

officers had seen Cupp on numerous occasions pass the parcels containing the white slips of paper to the petitioner at the usual rendezvous, and had also watched the petitioner drive with these papers to the North Burris Road apartment. Deputy sheriff Bublitz had seen his informant, Maltby, riding in petitioner's Cadillac; and when Maltby told Bublitz that he was the telephone "spot" man for "C.H." and described this person, the description corresponded with the one which the California Bureau of Criminal Identification had for the petitioner. The officers had the right to connect their physical observations with their significant hearsay information, as well as their knowledge of local professional gambling activities (*supra*, pp. 6-8). All the facts together operated to establish probable cause for the belief that petitioner was an important bookmaker. Even though hearsay is not legally competent in a criminal case, this Court has made it clear that there is a difference in the requirements for a finding of guilt in a criminal case and probable cause for an arrest or for a search and seizure, with much more latitude allowed for the reception of evidence to show probable cause. *Brinegar* v. *United States*, 338 U.S. 160, 172-174; *Draper* v. *United States*, 358 U.S. 307, 310-312.[8]

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[8] The dictum in *Grau* v. *United States*, 287 U.S. 124, 128 (Pet. 11), relied upon by petitioner, has been rejected in *Brinegar* v. *United States*, *supra*, 338 U.S. at 174, footnote 13, and in *Draper* v. *United States*, *supra*, 358 U.S. at 312, footnote 4.

2. Contrary to petitioner's contention (Pet. 15-18), the evidence was sufficient to support his conviction. He erroneously argues that there was no showing that he was "engaged in the business of accepting wagers" within 26 U.S.C. 4401(c) (*supra*, pp. 2-3), and implies that he occupied a position of immunity similar to that of a "pick-up man", who, this Court held in *United States* v. *Calamaro*, 354 U.S. 351, is not subject to a wagering tax.

But petitioner was clearly charged in the information as a principal, not as a "pick-up man" (R. 3). The bill of particulars furnished pursuant to his motion indicated numerous specific instances where he had accepted horse betting wagers either individually or as principal through the agency of Cupp (R. 9-17). And the evidence, although to a certain extent circumstantial, was sufficient to show petitioner's guilt as a principal. He was seen on numerous occasions receiving rolled up packages of papers from Cupp and once from an unidentified woman[4] at a usual rendezvous. On August 15, 1957, after witnessing the usual procedure and following petitioner to his North Burris Road apartment which he used for his bookmaking operations, the officers with the aid of the search warrant found petitioner with a number of papers containing notations of bets in Cupp's handwriting and the totalization of wins and losses on these bets in petitioner's handwriting. Petitioner admitted that these were betting

[4] It was a reasonable inference from the attendant circumstances for the court to infer that these people were "runners or pick-up men" (R. 60).

markers. It was also undisputed that petitioner had not registered or paid the required wagering occupational tax.

Petitioner's acceptance of bets occurred not in isolated instances, but in the course of a regular engagement in the betting business. Cf. *Kahn* v. *United States*, 251 F. 2d 160 (C.A. 9), certiorari denied, 356 U.S. 918. As the court below pointed out (Pet. App. B 22), the win-loss owe sheets taken from petitioner covered a period of racing from July 29 to August 15, 1957 (R. 60, 9-16). These owe sheets obviously had not been picked up each night by "Swede", as petitioner had stated in a futile attempt to show that he was a mere bookkeeper and not a bookmaker (R. 60). Petitioner argues that since the government introduced his statement as part of its case, it was bound (in the absence of specific proof to the contrary) by his self-serving assertion that he did not need a wagering tax stamp because he was not a bookmaker (Pet. 17). The trier of fact could, however, properly credit only that part of a petitioner's statement which accorded with the other facts proved at the trial. The government was entitled to show all the circumstances surrounding the execution of the search warrant, including petitioner's contemporaneous statement, and was not bound by the exculpatory matter in the statement which also contained important admissions. Cf. *Epps* v. *United States*, 157 F. 2d 11, 12 (C.A. D.C.); *United States* v. *Cindrich*, 140 F. Supp. 356, 359 (W.D. Pa.), affirmed, 241 F. 2d 54 (C.A. [illegible]), and see *United States* v. *Palese*, 133 F. 2d [illegible] (C.A. 3).

3. Finally, petitioner's contention that the prosecution did not establish proper venue is without substance (Pet. 18-19). The venue of the prosecution for non-payment of the wagering tax was the place where the business of wagering was being carried on. *United States* v. *Bowman*, 137 F. Supp. 385, 387 (D. D.C.); *Beach* v. *United States*, 240 F. 2d 888 (C.A. D.C.). The evidence showed that petitioner's betting business was conducted in Compton, California, where the rendezvous at the auto park adjoining Mark's Restaurant and petitioner's North Burris Road apartment were located (R. 43, 44). The court below properly took judicial notice that Compton is in Los Angeles County, which under 28 U.S.C. 84 is within the District Court's venue. *United States* v. *Echeles*, 222 F. 2d 144, 158 (C.A. 7), certiorari denied, 350 U.S. 828; *Dean* v. *United States*, 246 F. 2d 335, 338 (C.A. 8).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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